

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the General Government Appropriations Committee

**BILL:** CS/CS/SB 1078

**INTRODUCER:** General Government Appropriations Committee, Judiciary Committee, and Senator Baker

**SUBJECT:** Water Management Districts/Limitation of Liability

**DATE:** April 15, 2009      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Uchino</u>	<u>Kiger</u>	<u>EP</u>	<b>Favorable</b>
2.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	<b>Fav/CS</b>
3.	<u>Pigott</u>	<u>DeLoach</u>	<u>GA</u>	<b>Fav/CS</b>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill expands the limitation of liability of a water management district (WMD), with respect to areas made available to the public for recreational purposes without charge, to include district lands and water areas. The bill provides that a WMD retains the limitation of liability for certain temporary commercial activities.

The bill provides that the limitation of liability of a WMD applies regardless of whether the person accessing the park area, district or other lands, or water areas is an invitee, licensee, or trespasser, and regardless of whether the person was engaged in a recreational activity at the time of an accident. The limitation of liability also applies to park areas, district or other lands, and water areas used by the public for recreational activities regardless of whether that area was made available to the public at the time of the accident.

The bill also specifies that a private landowner, who provides an easement to a WMD for purposes of providing access through private land to lands or water areas that a WMD has made available for recreational purposes, is covered by liability protection.

Additionally, the bill adds a definition for “park area, district or other lands, or water areas.”

This bill substantially amends section 373.1395, Florida Statutes.

## II. Present Situation:

### Recreational User Statutes

Participation in recreational activities has increased over the years due to an increased awareness of positive health benefits and personal enjoyment. In 2006, sports participation in the United States reached nearly 263.1 million participants, up almost five percent from 2001.<sup>1</sup> Participation in recreational activities grew so fast that the demand for land grew faster than the government could acquire land for public use.<sup>2</sup> Accordingly, in 1965, the Committee of Officials on Suggested State Legislation created a model act to encourage private landowners to open their land to the public for recreational use, which led to 33 states enacting recreational user statutes.<sup>3</sup> In 1979, the National Association of Conservation Districts conducted a study of landowner liability and trespass laws, finding that these laws “were such that injured recreational users were able to recover to such a degree that landowners were often discouraged from opening their lands for recreational use.”<sup>4</sup> Stemming from this study, the federal government proposed the 1979 Model Act, which provided a broader definition of the term “owner” and began the shift away from application only to private landowners and toward application to governmental entities.<sup>5</sup> Currently, all 50 states have some form of a recreational user statute.<sup>6</sup>

Florida’s recreational user statute provides, in part:

An owner or lessee who provides the public with a park area or other land for outdoor recreational purposes owes no duty of care to keep that park area or land safe for entry or use by others, or to give warning to persons entering or going on that park area or land of any hazardous conditions, structures, or activities thereon. An owner or lessee who provides the public with a park area or other land for outdoor recreational purposes shall not, by providing that park area or land:

- Be presumed to extend any assurance that such park area or land is safe for any purpose.
- Incur any duty of care toward a person who goes on that park area or land.
- Become liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on that park area or land.<sup>7</sup>

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<sup>1</sup> Michael S. Carroll et al., *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. Legal Aspects Sport 163, 163 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 164.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 164-65.

<sup>6</sup> *Id.* at 164.

<sup>7</sup> Section 375.251(2)(a), F.S.

An owner or lessee is not entitled to the protection above if there is any charge made or usually made for entering or using the park area or land, or if there is any commercial activity conducted on the park area or land.<sup>8</sup>

The statute also provides the same protection for land or water areas leased to the state, which are open to the public for outdoor recreational purposes.<sup>9</sup> If a landowner leases land to the state to be used for recreational purposes, the protection applies whether the person going on the land is an invitee, licensee, or trespasser.<sup>10</sup>

The limitation of liability provided by the statute does not apply if the landowner or lessee deliberately, willfully, or maliciously injures a person or property on the park area or land for outdoor recreational purposes.<sup>11</sup>

The purpose of the statute is to “encourage persons to make available to the public land, water areas and park areas for outdoor recreational purposes by limiting their liability.”<sup>12</sup>

### **Water Management Districts**

In 1972, the Legislature created five water management districts (WMDs) to implement the provisions of ch. 373, F.S., also known as the Florida Water Resources Act of 1972.<sup>13</sup> Section 373.019(21), F.S., defines a water management district as “any flood control, resource management, or water management district operating under the authority of this chapter.” The five WMDs are the Northwest Florida Water Management District, the Suwannee River Water Management District, the St. Johns River Water Management District, the Southwest Florida Water Management District, and the South Florida Water Management District.<sup>14</sup> In implementing the Florida Water Resources Act, the WMDs are to “manage water and related natural resources to ensure their continued availability while maximizing environmental, economic and recreational benefits.”<sup>15</sup>

Similar to the recreational user statute applicable to landowners and lessees, the Legislature has also provided WMDs with limited liability, if the WMD provides the public with park area or other land, or allows access over district lands, for recreational purposes. Under s. 373.1395(2), F.S., WMDs owe no duty of care to keep park areas or other land safe for entry or use by the public for outdoor recreational purposes, or to warn of potentially hazardous

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<sup>8</sup> Section 375.251(2)(b), F.S.

<sup>9</sup> Section 375.251(3)(a), F.S.

<sup>10</sup> Section 375.251(3)(b), F.S. Generally, laws governing landowner liability focus on the duty of care owed by the landowner to the person entering the land based on that person’s status as either an invitee, licensee, or trespasser. However, recreational user statutes eliminate the burden of determining an entrant’s status by limiting the duty the landowner owes to all entrants as long as they are engaged in a recreational use and were not charged a fee. Michael S. Carroll et al., *supra* note 1, at 165.

<sup>11</sup> Section 375.251(4), F.S.

<sup>12</sup> Section 375.251(1), F.S.

<sup>13</sup> Section 373.016, F.S.

<sup>14</sup> Comm. on Envtl. Preservation and Conservation, Fla. Senate, *Agency Sunset Review of the Water Management Districts*, 9 (Report Number 2008-212) (Feb. 2008), *available at* [http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-212eplong.pdf](http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-212eplong.pdf) (last visited Mar. 19, 2009).

<sup>15</sup> *Id.* at 12.

conditions, structures, or activities on the land. Additionally, a WMD “does not, by providing that park area or land, extend any assurance that such park area or land is safe for any purpose, does not incur any duty of care toward a person who goes on that park area or land, and is not responsible for any injury to persons or property caused by an act or omission of a person who goes on that park area or land.”<sup>16</sup>

A WMD is not entitled to the limitation of liability if there is any charge made or usually made for entering or using the park area or land, or if there is any commercial activity conducted on the park area or land.<sup>17</sup> Additionally, s. 373.1395(4), F.S., provides that a WMD is not entitled to the limitation of liability for gross negligence or a deliberate, willful, or malicious injury to a person or property.

The statute also provides the same protection for land or water areas leased to the state, which are open to the public for outdoor recreational purposes. If a WMD leases land to the state to be used for recreational purposes, the protection applies whether the person going on the land is an invitee, licensee, or trespasser.<sup>18</sup>

Current law does not specify whether a WMD is entitled to liability protection if a person not engaged in an outdoor recreational activity is injured on the land.

Florida appellate courts have only addressed s. 373.1395, F.S., once. In 2002, the Fourth District Court of Appeal heard *South Florida Water Management District v. Daiagi*, 824 So. 2d 216 (Fla. 4th DCA 2002), where a dirt bike rider filed suit against the South Florida Water Management District (district) for injuries he sustained when he ran into a drainage ditch on the district’s property. The court looked at cases interpreting s. 375.251, F.S., the recreational use statute protecting private landowners, for guidance and held that there was a question of fact for the jury’s determination that precluded summary judgment.<sup>19</sup> Specifically, there was conflicting testimony regarding whether the land was open to the public or whether the dirt bike rider was a trespasser.

### III. Effect of Proposed Changes:

**Section 1** amends s. 373.1395, F.S., to expand the current limitation of liability given to water management districts to include their district lands and water areas, in addition to the protection already granted to their park areas and other lands that are available to the general public for recreational use.

The bill clarifies that WMDs that allow public access over, or use of, their land or water areas for outdoor recreational purposes do not have to make any assurances that the land or water areas are safe for any purpose. Also, a WMD does not incur a duty of care and is not responsible for any injury to persons or property by allowing public access over, or use of, their land or water areas.

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<sup>16</sup> Section 373.1395(2), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Section 373.1395(3), F.S.

<sup>19</sup> *Daiagi*, 824 So. 2d at 217.

The bill provides that a WMD retains the limitation of liability for certain commercial activities. For example, the temporary sale of food, beverages, plants, or tee shirts at temporary special events, as well as activities conducted by a nonprofit organization associated with temporary special events, are not considered commercial activities for purposes of determining whether a WMD is entitled to limited liability.

The bill provides that a WMD enjoys limited liability protection regardless of whether the person entering or accessing the land or water area is an invitee, licensee, or trespasser. Additionally, the limitation of liability applies regardless of whether a claimant or person was engaged in an outdoor recreational purpose at the time of an occurrence, and regardless of whether the land or water areas being used by the public for recreational activities were made available to the public at the time of the accident or occurrence.

Additionally, the bill specifies that a private landowner who provides an easement to a WMD, for purposes of providing access through private land to lands or water areas that a WMD has made available for recreational purposes, is covered by the liability protection provided in s. 375.251, F.S. This liability protection applies with regard to the use of the easement by the general public or employees and agents of the WMD or other regulatory agencies.

Finally, the bill defines the term “park area, district or other lands, or water areas” to mean “all park areas, district or other land, right of ways, and water areas that the water management district controls, possesses, or maintains, or in which the water management district has a property or other interest, whether in fee simple, easement, leasehold, contract, memorandum of understanding, or otherwise.”

**Section 2** provides an effective date of July 1, 2009.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under the bill, the current limitation of liability protection given to water management districts (WMDs) is expanded. By expanding a WMD’s liability protection, the bill could be subject to constitutional challenge under the access to courts provision of the Florida Constitution. Article I, s. 21 of the State Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale,

denial or delay.” This right of access protects only “those rights of action that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.”<sup>20</sup> Under the Florida Supreme Court case *Kluger v. White*:

Where a right of access . . . has been provided . . . the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>21</sup>

Although possible, it doesn’t appear likely that an access to courts issue would succeed. In 1979, the Florida Supreme Court addressed the access to courts issue in *Abdin v. Fischer*, 374 So. 2d 1379 (Fla. 1979). In that case, the Court was asked to consider whether the recreational user statute, s. 375.251, F.S., violated Art. I, s.21 of the State Constitution because “the statute bars a common law cause of action against landowners and lessees for damages resulting from a defective or dangerous condition on the land.”<sup>22</sup> The Court found that the statute did not deny a person access to courts, holding that “legislative action that alters standards of care need only be reasonable to be upheld. The legislature sought to encourage the opening of recreational land by limiting the landowners’ and lessees’ liability. This is a reasonable exercise of legislative power, and it does not violate Article I, section 21, Florida Constitution.”<sup>23</sup>

Section 375.251, F.S., limits liability of private landowners making their land available to the public for recreational purposes. Sections 375.251 and 373.1395, F.S., are nearly identical in purpose. Accordingly, it would appear unlikely that an access to courts claim would be successful under s. 373.1395, F.S., because the Florida Supreme Court has already ruled that there was no such issue under s. 375.251, F.S.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

This bill is designed to further encourage water management districts to make land, water areas, and park areas available to the public for recreational use by expanding the current limitation of liability protection given to WMDs. The bill should not have a direct fiscal impact on the private sector. However, it does provide limited liability to a WMD opening its land to the public for recreational purposes, which may prohibit a citizen from

<sup>20</sup> 10A FLA. JUR 2D *Constitutional Law* s. 355. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

<sup>21</sup> *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

<sup>22</sup> *Abdin*, 374 So. 2d at 1380.

<sup>23</sup> *Id.* at 1381.

bringing a lawsuit should he or she incur personal injury or property damage on the WMD's land or water areas.

Additionally, a private landowner who provides a WMD an easement over his or her land, in order to allow access to land or water areas that the WMD has made available to the public for outdoor recreational use, will be entitled to liability protection under the bill.

**C. Government Sector Impact:**

The bill may have an indirect fiscal benefit to water management districts. To the extent the bill protects WMDs from certain liability, it may have a positive fiscal impact on WMDs in that they may experience fewer court costs and expenses for defending against claims for injury or damage sustained by persons or property on WMD land or water areas.

**VI. Technical Deficiencies:**

Throughout the bill the term "outdoor recreational purposes" is used, and current law defines that term. However, on line 74, the term "recreational activity" is used in the bill. Recreational activity is not defined in the bill or in current law. The bill may need to be amended to change "a recreational activity" on line 74 to "an outdoor recreational purpose."

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by General Government Appropriations Committee on April 15, 2009:**

The committee substitute clarifies the protections, immunities, and limitations of liability provided to water management districts. Specifically, it clarifies that water management districts cannot be held liable when a claimant or person was engaged in an outdoor recreational purpose at the time of the accident or occurrence.

**CS by Judiciary on March 25, 2009:**

The committee substitute:

- Removes language from the bill specifying that limited liability does not apply if a water management district (WMD) directly charged the public for entering or using its land or water areas;
- Specifies that the temporary sale of food, beverages, plants, or tee shirts at temporary special events, as well as activities conducted by a nonprofit organization associated

with temporary special events, are not considered commercial activities for purposes of determining whether a WMD is entitled to limited liability;

- Extends liability protection under Florida's recreational user statute to private landowners who provide their land via an easement to a WMD for the purposes of allowing access to lands or water areas that the WMD has provided or made available to the public for outdoor recreational purposes; and
- Makes technical and conforming changes.

**B. Amendments:**

None.